

Message Text

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DRAFTED BY L/M:HFSHAMWELL:MFM

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ARA/MGT:KDACKERMAN

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TO AMEMBASSY BRASILIA

AMCONSUL SAO PAULO

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E.O. 11652: N/A

TAGS: APER, P4

SUBJECT: ACCEPTANCE OF EMPLOYMENT BY DEPENDENTS OF FOREIGN
SERVICE OFFICERS

REF: (A) SAO PAULO 2165 (B) BRASILIA 9025 (C) STATE 109306

1. REFTELS A AND B AGAIN RAISED QUESTION OF ACCEPTANCE OF
EMPLOYMENT BY CERTAIN DEPENDENTS OF DEPARTMENT OFFICERS
STATIONED IN SAO PAULO AND REPORTED REQUEST OF GOB THAT
THESE DEPENDENTS REQUEST ISSUANCE OF TEMPORARY VISA TO
REPLACE DIPLOMATIC VISA AS A CONDITION OF ACCEPTING TEACH-
ING EMPLOYMENT IN BRASILIA. EMBASSY EXPRESSED CONCERN
THAT IMPLEMENTATION OF THIS PROCEDURE WOULD PLACE WORKING
DEPENDENTS IN AN UNPROTECTED POSITION AND WOULD CONSTITUTE
TOTAL WAIVER OF IMMUNITY. REFERENCE WAS MADE TO POSITION
TAKEN BY DEPARTMENT, REF C, SUGGESTING THAT EFFORT BE MADE
TO ALLOW DEPENDENTS TO WAIVE IMMUNITY ON A PARTIAL BASIS
ONLY.

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2. DEPARTMENT AGREES WITH THE POSITION OF GOB THAT DE-

PENDENTS OF CONSULAR OFFICERS ARE NOT ENTITLED TO ENJOY PRIVILEGES AND IMMUNITIES IF ENGAGED IN GAINFUL EMPLOYMENT IN THE RECEIVING STATE. ARTICLE 57 OF THE VIENNA CONVENTION ON CONSULAR RELATIONS CLEARLY PROVIDES FOR THE

WITHDRAWAL OF SUCH PRIVILEGES AND IMMUNITIES. UNDER THESE CIRCUMSTANCES IF IN FACT THE ACCEPTANCE OF A TEACHING POSITION WOULD CONSTITUTE "A GAINFUL OCCUPATION," THEN THERE IS NO CHOICE BUT TO AGREE TO THE WITHDRAWAL OF THE PRIVILEGES AND IMMUNITIES. A FORMAL WAIVER WOULD NOT BE NECESSARY SINCE THE PRIVILEGES AND IMMUNITIES WOULD NOT BE REQUIRED IN THE FIRST PLACE. HOWEVER, THE NEGOTIATING HISTORY OF ARTICLE 57 OF THE VIENNA CONVENTION INDICATES THAT ALL EMPLOYMENT DOES NOT QUALIFY AS "PRIVATE GAINFUL OCCUPATION." THE MOST IMPORTANT CRITERION IN THIS REGARD IS WHETHER THE ACTIVITIES CARRIED OUT ARE PRIMARILY FOR THE PURPOSE OF PECUNIARY GAIN. IF NOT, THE WITHDRAWAL OF PRIVILEGES AND IMMUNITIES PROVIDED FOR UNDER ARTICLE 57 WOULD NOT BE REQUIRED. PRIOR TO FINAL DECISION ON THE LARGER QUESTION, EMBASSY SHOULD DISCUSS THIS PARTICULAR ISSUE WITH THE GOB.

3. EMBASSY SHOULD BE AWARE THAT THE LAW RESPECTING THE DEPENDENTS OF CONSULAR OFFICERS IS DIFFERENT FROM THAT RESPECTING DEPENDENTS OF DIPLOMATIC OFFICERS. THERE IS NO EQUIVALENT IN THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS TO ARTICLE 57 OF THE VIENNA CONVENTION ON CONSULAR RELATIONS. THE CLOSEST EQUIVALENT IN THE DIPLOMATIC RELATIONS CONVENTION IS ARTICLE 31, PARAGRAPH 1, SUBPARAGRAPH C -- HENCE THE DEPARTMENT'S RECOMMENDATION CONCERNING AN EFFORT TO SECURE ONLY A PARTIAL WAIVER OF IMMUNITY, WHICH UNDER THE DIPLOMATIC RELATIONS CONVENTION, RELATES ONLY TO CIVIL AND ADMINISTRATIVE JURISDICTION. UNDER THE VCCR, WORKING DEPENDENTS ARE NOT ENTITLED TO ANY PRIVILEGES AND IMMUNITIES. WHILE THE DEPARTMENT WOULD CERTAINLY FAVOR A NEGOTIATED SETTLEMENT UNDER WHICH DEPENDENTS OF CONSULAR OFFICERS WILL RETAIN AT LEAST IMMUNITY FROM CRIMINAL JURISDICTION, THE DEPARTMENT CANNOT REQUIRE THE SAME CONSISTENT WITH THE PROVISIONS OF THE TREATY.

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4. DEPARTMENT REQUESTS EMBASSY AGAIN SEEK GOB AGREEMENT TO WAIVER OF CIVIL AND ADMINISTRATIVE JURISDICTION ONLY ON THE GROUND THAT THE TYPE OF EMPLOYMENT INVOLVED IS NOT GAINFUL EMPLOYMENT WITHIN THE MEANING OF ARTICLE 57 OF THE VIENNA CONSULAR RELATIONS TREATY. IF NO SUCCESS ACHIEVED ON THIS FRONT, DEPARTMENT WILL ADVISE CONCERNING ALTERATION OF VISA STATUS. KISSINGER

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